SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1061

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association, et al.,

Petitioners

vs.

GEORGE R. WILLIAMS, et al.,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioners Pacific Maritime Association and International Longshoremen's and Warehousemen's Union and all other defendants in the above-entitled matter, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on August 28, 1967, which was explained by the Court's memorandum of October 30, 1967 denying the petitions for rehearing. The Ninth Circuit's decision reversed the District Court's orders dismissing respondents' fourth amended complaint and granting summary judgment in favor of petitioners.

OPINIONS BELOW

The opinion and orders of the United States District Court for the Northern District of California (R. 501) dismissing respondents' original, first amended, second amended and third amended complaints are unreported.[1] They appear in the Appendix at pages 1-8. The District Court's order dismissing respondents' fourth amended complaint and granting summary judgment in favor of petitioners is also unreported. It appears in the Appendix at page 9. The opinion of the Court of Appeals (Doc. 3) is reported at 384 F.2d 935 (1967) and appears in the Appendix at pages 11-25. The judgment of that court (Doc. 4) appears in the Appendix at page 26. The opinion and order of the Court of Appeals denying petitioners' petition for rehearing (Docs. 7, 8) appear in the Appendix at pages 27-29.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit were filed on August 28, 1967 (Doc. 4). Petitioners' timely applications for rehearing were denied by that court by an opinion and order entered on October 30, 1967 (Docs. 5, 6, 7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Do members of a collective bargaining unit, who have lost their jobs as a result of the application of a provision of a collective bargaining contract, have a federal court remedy to set aside the contract provision on the

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1. The following abbreviations are used herein: "R.T." refers to the reporter's transcript in the District Court. "R." refers to the balance record on appeal to the Ninth Circuit. "Doc." refers to other documents in the record certified to this Court. "App." refers to the Appendix to this petition.

ground that its substance is arbitrary, capricious, unreasonable, unfair, or discriminatory?

2. Can the courts create a judicial remedy available to persons covered by the National Labor Relations Act, which duplicates their exclusive statutory remedy under § 10 of that Act, 29 U.S.C. § 160, for breach of the duty of fair representation in the negotiation of an amendment to a collective bargaining agreement?

3. Do the courts have jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to hear a collateral attack on a final decision in the grievance-arbitration adjudication procedure under the collective bargaining contract where there is no litigable claim that the door to collateral attack was opened by a union breach of its duty of fair representation in that adjudication procedure?

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, provides:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT

This case involves, on the one hand, a group of men who were formerly employed as longshoremen in San Francisco and, on the other, their employers and their union.

Petitioner Pacific Maritime Association (PMA) is the collective bargaining representative of employers of long-

shoremen in the San Francisco Bay Area and elsewhere on the Pacific Coast (R. 1). Petitioner International Longshoremen's and Warehousemen's Union (ILWU) is the exclusive collective bargaining representative of the longshoremen (R. 1, 109, 110). Petitioner Local 10 is a chartered local union affiliate of the ILWU limiting its membership and activities to the San Francisco area (R. 110). The individually named petitioners are described in the complaint as "officers or executive officials of the defendant labor organizations" (R. 120, ¶52).

Respondents at one time were limited registration (Class B) longshoremen on the San Francisco waterfront. Prior to starting this case, each respondent applied to advance from this probationary seniority status to full registration (Class A) status. His application was denied because he failed to meet the established standards to advance in seniority status as a longshoreman. This action, in turn, gave rise to the termination of his registration status. He then stood discharged ("deregistered").

Respondents claim they should be returned to employment as registered longshoremen under the ILWU-PMA collective bargaining contract, with the seniority they had prior to their discharges in 1963. Respondents attack provisions of the contract, particularly the amendments that were the specific basis of their deregistrations in 1963. They also attack the final decision on their grievances in the contractual adjudication process, which sustained their deregistrations.

The ILWU-PMA collective bargaining history, which has continued since 1934, has produced a contract that is complex. It covers all ports in California, Oregon and Washington. The basic contract document (R. 4) is supplemented by local rules and agreements, as well as supplemental documents of coastwide application, filling in the interstices in the basic document.

The contract also reflects the unique nature of the longshore employment. It is not characteristic of the longshoreman's job that he reports to a regular work place or even to a number of places designated by a single employer. Rather, he reports to a dispatching hall and is dispatched from there to work assignments for any one of the many employers who are represented by PMA for collective bargaining purposes. Accordingly, the longshoreman's registration status at the dispatching hall establishes his seniority rights.

Three basic seniority classifications are now used in the administration of the ILWU-PMA contract. The core of longshore labor consists of the fully registered (Class A) longshoremen. To supplement this work force, there are the probationary or limited registration (Class B) longshoremen. Provisions exist for advancing men from the probationary group to full (Class A) registration from time to time as needed. A third category of "casual employes" also exists; it includes the longshoremen on neither registered list. These three basic seniority classifications have led to three corresponding gradations in the other consequences of seniority, including steadiness of employment, amount and regularity of earnings, security against lay-off, likelihood of discharge, selection of work classifications, promotion, guarantees, vacations, welfare, pensions, and other fringe benefits.

The contract also provides that the Joint Port Committee in each port shall operate the local dispatching hall and shall have control over the registration lists, subject to the ultimate control of a single Joint Coast Committee, with the power to make additions or subtractions (R. 4, page 44). In 1959 the San Francisco committee took applications from a large number of men seeking registration as Class B probationary longshoremen and selected 742 men from the 9,606

applicants. Respondents were among that group (R. 754). During the next four year period the registration list was frozen while the parties were negotiating in detail over the industry's problem of needing automation of operations and the employes' problem of needing assurances of continued employment while operations were so modernized. By the spring of 1963, the original 742 B men had been reduced to 564 by attrition.

In 1963 all of the Class B men were given the opportunity to file applications for Class A seniority status (R. 755). All men then on the Class B registration list, including respondents, submitted applications. In the applications filed at this time, as in the documents that respondents filed in 1958, there is express notice to each man of the power of the local committee to adopt rules affecting his registration, and he specifically agreed that his employment was subject to these rules. He further agreed that any complaints he had regarding his application would be "handled under the grievance procedure set forth in the contract" (R. 766; see also R. 4k).

The basic collective bargaining document includes rules setting forth penalties, including deregistration, for contract infractions by the fully registered men. In regard to the Class B (limited registration) men, § 17.851 of the contract provides:

> "... [M]ore stringent rules and penalties applicable to limited registered men ... that are provided in existing and future local ... rules and procedures or by mutually agreed practices shall be applicable." (R. 4, page 79)

To supplement this provision, a set of rules for Class B longshoremen (R. 192-194) was distributed to the respondents when they were registered. These rules declared several types of conduct to be wrongful and specified penalties, in some circumstances immediate deregistration, that could be

imposed while the men remained in Class B seniority status. In addition, the 1958 registration and deregistration rules (R. 123-129) permitted deregistration of any Class B longshoreman for *any* cause (R. 127, item xi). The subsequent 1963 rules, here attacked by respondents, narrowed the meaning of "*any* cause" by limiting it to situations where there had been prescribed quantities of certain of the types of conduct that had been declared to be wrongful in the Class B rules (R. 192-194). These 1963 rules, which were adopted to govern the committee's judgments as to the men's overall employment histories while in Class B seniority status in reviewing their applications to advance to fully registered (Class A) status, called for the deregistration of those whose records disclosed such cause (R. 756, 89)—such "cause" including absenteeism, cheating in reporting hours so as to gain advantages in the distribution of work through the dispatching hall, repeated lateness in paying their bills for dispatching hall costs, insubordination, intoxication, etc.—and for the advancement to Class A seniority status of those whose Class B employment history was satisfactory under these rules.

The Joint Port Committee accordingly reviewed the records it had as to the longshore work history of each applicant against the standards for these histories set forth in the 1963 rules. The Class B men who initially appeared to have given cause for deregistration were given notice thereof and an opportunity to appear before the Joint Port Committee. Each respondent appearing was told of the matters at issue and was permitted to reply (R. 757-758). After further consideration of the men's records, when errors in the original view of the facts were brought to light and corrected, the Committee reached its final determination as to who should be advanced to Class A registration and who should be deregistered. At this time 467 of the

Class B men who had applied for fully registered Class A status in 1963 were advanced to Class A. The Committee concluded that the remaining 97 should be reregistered. Respondents are 51 of these 97 men (R. 757).

Each of the respondents took his deregistration into the adjudication procedures provided by the grievance-arbitration machinery of the contract. The notice of his deregistration included detailed information as to how and when to do this. In accordance with this information, each respondent filed a timely grievance on a form prepared by respondents, which asserted:

> "Your committee de-registered me on June 17. On July 24, I received your letter denying my hearing appeal. In so doing you consummated an action that is discriminatory. You have not judged all the men involved by the same standards.
>
> "I appeal your decision and request another hearing as stipulated, where I will prove and document this discrimination." (R. 2, 4L).

The Joint Port Committee heard the grievances and entered a decision adverse to respondents. They then appealed their grievances to the Joint Coast Committee.

The Decision of the Joint Coast Committee, issued December 18, 1964, was also adverse to respondents. This committee found that the rules as to advance in registration status and as to deregistration had been applied fairly and uniformly, that each respondent failed to meet these standards, and that each was properly deregistered (R. 86-91).[2]

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2. The Joint Coast Committee sustained the discharges under the 1963 rules on the basis of findings that each had given cause for deregistration under these rules (R. 90). This action was based on evidence that 35 respondents violated the low-man-out rules in the course of which they dishonestly left some 603 hours out of reports they submitted in getting dispatched to work, that 44 of them were late at least 365 times in making the payments

On these findings it concluded there had been no discrimination. Respondents' attorney was served with the decision the day it was rendered (R. 83). The Joint Coast Committee simultaneously gave notice (R. 84-85) to each respondent of his right to appeal to the Coast Arbitrator for a review by him of the facts of deregistration (R. 4, page 69). No appeal was filed (R. 83). Instead, the Joint Coast Committee's decision has been the subject of this collateral attack in the courts.

While the grievance-arbitration adjudication process was being carried on, the jurisdiction of the National Labor Relations Board was invoked by other deregistered men. Five Class B men who had been deregistered at the same time as respondents filed unfair labor practice charges against petitioners in mid-1963 (R. 231). The charges were timely; a complaint was issued. After lengthy hearings, a decision was rendered by the trial examiner on May 4, 1965 (R. 231-263). He found there had been a breach of the duty of fair representation, action based on arbitrary, irrelevant and invidious considerations, and unlawful discrimination (R. 255).

Some two weeks later most of respondents filed unfair labor practice charges against petitioners (R. 176-179). Their charges, like their complaint in court, attacked their deregistration. These stated, in part:

> "The actions taken by PACIFIC MARITIME ASSOCIATION and the International Union and Local No. 10, were taken without cause, without prior notice of the cause or reason for said actions, and were the results of discrimination and treatment based upon irrel-

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required of them under the collective bargaining contract for the support of the dispatch hall, that there were five suspensions for intoxication, four suspensions for refusing to work as directed, three suspensions for walking off the job, six reprimands for refusing to work as directed, and 11 probations for poor work availability (R. 91q-91t).

> evant, invidious and unfair considerations. In addition, said actions were taken against the charging parties because of their nonmembership in the aforementioned union, and resulted in interfering, restraining and coercing them from exercising their rights guaranteed by Section 7 of the Act." (R. 179)

The charges were referred to an examiner for investigation (R. 177, 178b). On June 21, 1965 the Regional Director of the Labor Board informed the charging respondents (R. 176a, 180b) that their charges of "acts which arguably constitute unfair labor practices" could not be litigated before the Board because they had been filed after the expiration of the applicable six-months period of limitations specified in § 10(b) of the Act, 29 U.S.C. § 160(b).

Meanwhile an appeal had been taken to the Labor Board from the trial examiner's decision with respect to the five timely charges. On November 29, 1965, the Board reversed the trial examiner's findings and conclusions. It held that the discharges involved neither a breach of the duty of fair representation nor discrimination nor any other activity prohibited by the Act. The Board found the facts to be that the deregistrations were based on legitimate lawful standards, "the 1963 Rules", and that they were adopted in good faith in the collective bargaining process with the purpose of selecting the best longshoremen for full registration status. *Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local 10* [*Johnson Lee*], 155 NLRB 1231, 60 LRRM 1483 (1965).[3]

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3. The Board, 155 NLRB at 1234, referred to *Chicago Federation of Musicians* [*Shield Radio & T.V. Productions, Inc.*], 153 NLRB 68 (1965) and stated: "In the instant proceeding, the 'true purpose or real motivation' of the Respondent Union was meeting the industry's increasing needs for a greater number of steady, highly qualified, and responsible longshoremen by affording fully registered status to the most qualified of the limited registered longshoremen and abolishing the Class B list."

At this time respondents were in court attacking these same rules and the decision of the Joint Coast Committee (R. 86-91) applying them. That decision, respondents and the Court of Appeals (App. 23) and petitioners agree, is "final according to the contract". Two substantive claims made by respondents were considered in the opinions below.

The first claim is that the union violated its duty of fair representation in negotiating the 1963 registration rules. The opinion denying the petition for rehearing recognizes that pleading and proof of "hostile or invidious" discrimination is necessary to establish such a claim (App. 28). The facts allegedly underlying this claim of discrimination, like the claim that the contract was violated, remain obscure.

Petitioners and the district court believed they understood this claim. In view of the failure to spell out anything different in the five forms of complaint respondents filed with the district court, or in the supplementary affidavit and statements of their attorneys, petitioners assumed that this claim asserted violation of the contract's § 13, which reads:

> "There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or nonmembership in the Union, activity for or against the Union or absence thereof, or race, creed, color, national origin or religious or political beliefs."

Respondents have judicially admitted this type of discrimination is not involved. Thus the opinion of the Court of Appeals states (App. 21), "[Respondents] say that § 13.1 has nothing to do with their complaint. They contend . . . in short, that they were fired as Class B longshoremen."

The October opinion below sets out the allegations that it finds sufficient to state a claim of "hostile or invidious" discrimination (App. 28). These state that the new rules were arbitrary, were not reasonably relevant in determining

which Class B longshoremen should be advanced to Class A, were irrelevant and capricious in determining who should be deregistered, and were arbitrary and unfair.[4]

The second claim, discussed in the latter portion of the opinion of the Court of Appeals (App. 21-24), relates to the deregistration of respondents by the "final decision made by the Joint Coast Labor Relations Committee" (R. 118, ¶ 42, incorporating ¶ 24). Respondents allege that this decision was in violation of "the clear terms of the collective agreement" (R. 119; ¶ 46) and in violation of respondents' "individual rights" under the collective bargaining agreement (R. 119; ¶ 147). The Court of Appeals concluded that the decision of the Joint Coast Committee, that there was no contract violation, is subject to collateral attack in the courts although the opinion in no way disagrees with the contention of petitioners that there is no claim of "hostile or invidious" discrimination in the adjudication procedure leading to the final grievance decision under attack.

The August, 1967, order of the Court of Appeals for the Ninth Circuit set aside the summary judgment in favor of petitioners and remanded the matters raised by the fourth amended complaint for further proceedings in the trial court.[5] After timely petitions for rehearing, a supplemen-

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4. Respondents also alleged that the rules were applied discriminatorily against them. This generalization is explained by statements in an affidavit. These assert that these rules, which were adopted to govern the selection of men to advance from Class B status to Class A status, did not apply to the longshoremen who had previously achieved Class A seniority status (R. 343-345).

5. Respondents' fourth amended complaint, like its four predecessors, claims federal jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, on the basis of allegations of violation of the collective bargaining contract. It seeks declaratory relief, money damages for back pay for each of the 51 respondents and a variety of injunctive relief of the sort from time to time obtained through proceedings before the Labor Board (R. 121-122).

tary opinion explaining its decision was filed. Thereupon an order was entered denying rehearing on October 30, 1967.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals would require the federal courts to hear every claim that a collective bargaining provision is unfair, arbitrary, capricious, irrelevant or discriminatory.

The opinion below would put the courts into the business of passing judgment on the substance of collective bargaining agreements. No decision of this Court has ever gone this far. It has recognized this is not a judicial function.

The duty of fair representation requires the bargaining representative to make "an honest effort to serve the interests of all [in the collective bargaining unit] without hostility to any". *Ford Motor Co. v. Huffman*, 345 U.S. 330 at 337. The representative of a unit of employes has "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them". *Steele v. Louisville & N.R.R.*, 323 U.S. 192 at 203. The *Steele* opinion continues by recognizing that the union must necessarily at times enter into contract provisions that have unfavorable effects on some of the employes within the bargaining unit and that all of the members in the bargaining unit "are not identical in their interest or in their merit". The *Ford* opinion recognizes that differences inevitably arise in collective bargaining as to the manner and degree in which collective bargaining provisions affect individuals within the bargaining unit. The opinion recognizes that complete satisfaction of all persons within the unit is "hardly to be expected" and that the test is whether the bargaining representative has acted in "com-

plete good faith and honesty of purpose in the exercise of its discretion".[6] 345 U.S. 330 at 338.

The Ninth Circuit makes the same error as the Missouri Supreme Court made in the judgment reversed by this court in *Vaca v. Sipes,* 386 U.S. 171 (1967). In that case this Court overturned a holding that a jury verdict that an underlying grievance was meritorious established that the union committed a breach of the duty of fair representation in deciding not to appeal the grievance. Here, the Court of Appeals has directed the lower court to consider the respondents' complaint in light of its statement that "hostile or invidious" discrimination, and hence a breach of the duty of fair representation, can be shown merely by proving that the collective bargaining provision negotiated is arbitrary, capricious, irrelevant to the subject matter of the bargaining, unfair or discriminatory (App. 28). The footnote to the opinion denying rehearing (App. 28) illuminates the rationale of the court below. It concludes that *Vaca* supports its holding because the adjectives used in the pleadings to describe the substantive character of the collective bargaining provision here attacked are the same as those used in the *Vaca* opinion in describing the conduct of the union in carrying on its collective bargaining function.

A breach of the duty of fair representation cannot be established because a judge or jury concludes that he or they would have negotiated a different collective bargaining provision. One that might be more desirable from the point of view of the litigants in court, in the eyes of the jury, would be entirely unacceptable to the great body of employes in the collective bargaining unit. Thus, a "humanitarian" clause guaranteeing continued employment to un-

6. The Labor Board applies the same test generally and did so with respect to the rules here under attack. See footnote 3 supra.

satisfactory workers could militate against the possibility of gaining a substantial wage increase for the entire bargaining unit based upon the productivity of their labor. In the present case, such a question would be directly presented to the court hearing this matter on remand, for respondents found themselves to be a minority within the collective bargaining unit because they opposed the introduction of automated or mechanized equipment on the ground it would make their jobs harder although, in exchange, the employers added $29,000,000 to the total wage package of the entire bargaining unit (R. 339).[7]

The most serious vice in the decision of the court below, which cries out for immediate review of this matter in this Court, is the open invitation it provides to all groups and individuals within all collective bargaining units to move into the federal courts to try their claims that their exclusive collective bargaining representative is negotiating unsatisfactory contract provisions. The opinion below states it is necessary only that some one assert the provisions are arbitrary, capricious, unfair, irrelevant or discriminatory. Just as its *Vaca* opinion reverses the proposition that a jury verdict that a grievance is meritorious will not open the door to a court order sustaining the grievance in the absence of proof of a breach of the duty of fair representation, this Court must close the door to similar judicial review of the substance of collective bargaining contracts.

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7. The Labor Board has stated, "The automation concord . . . has been widely acclaimed as a history-making precedent, a peaceful settlement of a problem which has troubled the West Coast waterfront for a number of years." *International Longshoremen's and Warehousemen's Union* [*American Mail Line*], 144 NLRB 1432 at 1442 (1963). *Cf. Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 371 F.2d 747, 749 (C.A.D.C. 1966).

The difficulties of resolving matters through collective bargaining are already staggering. The solution of collective bargaining problems requires delicate and skillful negotiations. The collective bargaining process cannot continue to perform its vital function in our economy if the courts are available to consider the claims of the almost always present minority that the agreement achieved was unsatisfactory to them.

For the due and proper administration of the courts, it is also imperative that this Court promptly rule there is no door open to this type of litigation. The courts do not have the expertise to make value judgments on the merits of provisions in collective bargaining contracts. Furthermore, there are not enough courts to hear and determine the claims of those who are sure they could negotiate a contract more advantageous to their individual interests than the one negotiated by their union spokesman.

There is no exception to the Labor Board preemption doctrine to permit a judicial remedy for a union's breach of its duty of fair representation in the negotiation of a collective bargaining contract provision.

The Court of Appeals erroneously reads *Vaca v. Sipes*, 386 U.S. 171, in asserting that it gives a judicial remedy to those who claim that their union has breached its duty of fair representation in negotiating a collective bargaining provision that they do not like. Its opinion fails to recognize the difference between a breach of this duty in negotiating a contract and a breach of this duty that is directly involved in the litigation of a claim that there has been a violation of the collective bargaining agreement. Fundamental to the decision in *Vaca* is the proposition that the

employer should not be able to escape the consequences of its violation of the collective bargaining agreement because the union acts in breach of its duty of fair representation by failing to carry the grievance involved to the arbitrator. Fundamental to the decision in *Humphrey v. Moore*, 375 U.S. 335, is the principle that the employer cannot escape the consequences of its violation of the collective bargaining contract if the union has concurred in that violation by action it has taken in the adjudication of the grievance that is in breach of this duty. In both cases this Court recognized that the determination of the issues of the duty of fair representation was directly involved in a contract violation issue, an issue that is clearly within the jurisdiction of the courts and is beyond the jurisdiction of the Labor Board.

This distinction was clearly perceived by the Eighth Circuit in *Woody v. Sterling Aluminum Products, Inc.*, 365 F.2d 448 (8 Cir. 1966), cert. den. 386 U.S. 957, reh. den. 386 U.S. 1027. The Eighth Circuit held that a claim that the union negotiated its collective bargaining contract in bad faith to the plaintiffs' detriment and failed to represent the plaintiffs fairly and honestly in the negotiations did not set forth a claim within the jurisdiction of the federal courts but one within the exclusive jurisdiction of the Labor Board. The decision of the Eighth Circuit is thus in direct conflict with the decision in this case in the Ninth Circuit. On this ground the Court should grant certiorari to resolve this conflict. We submit that the Eighth Circuit is correct in its decision, for the exception relied upon stems from § 301 of the Labor Relations Management Act and so the court's jurisdiction must grow out of a claim of contract violation.

The decision below is in conflict with applicable decisions of this Court that the courts are open for a collateral attack on a final decision in the grievance procedure of a collective bargaining contract only where there has been a breach of the duty of fair representation in the grievance adjudication process.

The latter portion of the principal opinion of the Court of Appeals (App. 21-24) deals with the claim that the Joint Coast Committee's decision is in breach of the collective bargaining agreement. The opinion recognizes that this decision is "final according to the contract" (App. 23). It makes no suggestion that there is a litigable claim that there was any breach of the duty of fair representation in the conduct of the adjudication machinery under the contract, or anywhere after the grievances were filed in July 1963. Nevertheless, it holds this claim should be further considered in the trial court.

The opinions of this Court hold that decisions in grievance procedures that are final and binding under the terms of the contract are not open to collateral attack unless there is a litigable claim of breach of duty of fair representation or fraud in the conduct of the grievance machinery. In *Drivers Union v. Riss & Co.*, 372 U.S. 517, this Court held that grievance decisions final under the contract are final in court. An exception to the general rule was recognized in *Humphrey v. Moore*, 375 U.S. 335, where this Court held that such a decision in the grievance machinery would be open to judicial review in order to enforce a collective bargaining contract where a breach of the duty of fair representation in its handling of the grievance "would effectively undermine the decision of the Joint Committee as a valid basis for [the] discharge". 375 U.S. at 343. The holding of the case, however, is that the grievance decision

of the Joint Committee is "final and binding upon the parties, just as the contract says it is" because there was no fraud or breach of duty by the exclusive bargaining agent in the adjudication of the grievance. 375 U.S. at 351.

This Court recognizes the same exception and comes to the same conclusion for the same reason in *Vaca v. Sipes*, 386 U.S. 171. Again, the claim was made that a grievance decision that became final, here because of failure to carry it to the arbitrator, was binding upon the employe who had gone into court. This Court recognized that this defense would not be valid if the union's failure to appeal it to the arbitrator was an act in breach of the duty of fair representation. The Court stated that the litigant in court had to prove "arbitratory or bad faith conduct on the part of the Union in processing his grievance" to enable him to reverse the grievance decision that became final under the terms of the collective bargaining contract when the time to appeal to the arbitrator had expired. 386 U.S. 171 at 193. It sustained the defense because this proof was absent.

This Court should promptly take action to clarify the law in this important area. At the heart of a satisfactory collective bargaining process is a smoothly working grievance-arbitration procedure. The vitality of that procedure is critical to the vitality of the entire collective bargaining process as a means for maintaining industrial peace. The finality of decision in this process is of major importance if the economy of the country is to carry on without disturbance. The invitation of the opinion below to continuing litigation of points that should be finally resolved through the processes agreed upon between the union and the employer, by bringing to court the merits of decisions interpreting and applying the collective bargaining contract, cannot remain open. Employers and unions must be promptly reassured that the merits of grievance decisions reached in good faith will not be re-examined in court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

January 25, 1968

Respectfully submitted,

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(Appendix Follows)